No. 8346

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

DANG MEW WAN LUM,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

OPINION BELOW.

The only previous decision in this case is that of the United States District Court for the Territory of Hawaii (R. p. 11), which is not officially reported.

JURISDICTION.

This appeal involves the naturalization laws. The appellee petitioned the Court below for naturalization pursuant to Section 4 of the Act of September 22, 1922, as amended. (See 8 U.S.C.A., Sections 369, 369a and 368b.)

This appeal is taken from the decision and final order of the District Court entered April 4, 1936. (R. p. 12.) The petition for appeal was filed July 3, 1936 (R. p. 15), and allowed on the same date. (R. p. 19.) The jurisdiction of this Court is invoked under Section 128a of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A., Sec. 225.)

STATUTES INVOLVED.

The statutes involved are:

(a) Act of March 2, 1907, c. 2534, Sec. 3, 34 Stat. 1228. (See 8 U.S.C.A., Sec. 9, note 6.)

(b) Act of September 22, 1922, c. 411, Sec. 4, 42 Stat. 1022, as amended (see 8 U.S.C.A., Sec. 369) by the

(c) Act of July 3, 1930, c. 835, Sec. 2(a), 46 Stat. 854. (See 8 U.S.C.A., Sec. 369.)

(d) Act of March 3, 1931, c. 442, Sec. 4(a), 46 Stat. 1511. (See 8 U.S.C.A., Sec. 369a.)

(e) Act of July 2, 1932, c. 395, 47 Stat. 571. (See 8 U.S.C.A., Sec. 368b.)

The above statutes are set out in the Appendix.

PRELIMINARY STATEMENT.

To date the appellee has not employed counsel to represent her on this appeal, though advised to do so. The appellee may not file a brief.

STATEMENT OF FACTS.

The operative facts are: The appellee, Dang Mew Wan Lum, nee Dang Mew Wan (female), a person of the Chinese race, was born May 29, 1894, in Honolulu, Hawaii. On May 16, 1907, the appellee went to China, and there, at Dai Char, Chungshan, on May 2, 1910, married Lum Chew Hung, a person of the Chinese race, born February 3, 1886, at Dai Char, Chungshan, China.

On October 19, 1934, the appellee first returned to the United States, entering through the Port of Honolulu, Territory of Hawaii.

On April 4, 1936, the appellee petitioned the Court below for naturalization, pursuant to Section 4 of the Act of September 22, 1922, as amended. The sworn petition stated, in addition to the foregoing facts (R. p. 4), that the appellee remained married to the said Lum Chew Hung, and that she had not during her absence acquired other nationality by an affirmative act.

The Court below, over appellant's objections, held the appellee eligible for naturalization, and on April 4, 1936, the appellee executed the requisite formalities and had issued to her Naturalization Certificate No. 4,093,209.

QUESTIONS PRESENTED.

Is a woman of the Chinese race, who had lost her United States citizenship by marriage, prior to March 3, 1931, to an alien ineligible to citizenship, and who

has not acquired other nationality by affirmative act, eligible for naturalization pursuant to Section 4 of the Act of September 22, 1922, as amended (8 U.S.C.A., Secs. 369, 369a, and 368b), though she did not reside in the United States on July 2, 1932 (8 U.S.C.A., Sec. 368b)?

SPECIFICATION OF ERRORS.

The appellant relies upon both of the assigned errors, to wit:

I.

The Court erred as a matter of law in overruling the motion made in behalf of the United States to dismiss the petitioner's application for naturalization, as follows:

(Caption omitted.)

"MOTION TO DISMISS.

Comes the undersigned Naturalization Examiner for and on behalf of the United States, and moves that this petition for naturalization be dismissed with prejudice, and as grounds therefor respectfully shows:

That it appears from said petition that this petitioner is a person of the Chinese race, and therefore is ineligible to naturalization unless she is within the exception provided in Section 4, Act of March 3, 1931, relating to 'any woman who was a citizen of the United States at birth'; that petitioner was born at Honolulu, T. H., on May 29, 1894, and departed for China on May 16, 1907,

where she married a Chinese national on May 2, 1910, which marriage endures, and that she first returned to the Territory of Hawaii and the United States on October 19, 1934; that it follows petitioner is not included within the amendment of July 2, 1932, to the above act, as a woman who is to be considered as a citizen at birth, because she was not resident in the United States on July 2, 1932.

ERNEST J. HOVER,
U. S. Naturalization Examiner."

II.

The decision and final order of the Court is contrary to law.

It is obvious that both assignment of errors present the same question of law. Accordingly, for the purposes of this brief the argument will treat both assignment of errors together.

SUMMARY OF THE ARGUMENT.

I.

The appellee was not born a citizen of the United States of America.

II.

The appellee lost her United States citizenship by her marriage in 1910 to an alien ineligible to citizenship.

III.

The appellee is not eligible for naturalization pursuant to Section 4 of the Act of September 22, 1922, as amended by the Act of July 2, 1932.

ARGUMENT.

I.

THE APPELLEE WAS NOT BORN A CITIZEN OF THE UNITED STATES OF AMERICA.

As of the date of appellee's birth in Hawaii (May 29, 1894), the Provisional Government (January 17, 1893, to July 4, 1894, exc.) obtained in the Hawaiian Islands. On July 4, 1894, the Republic of Hawaii (July 4, 1894, to August 12, 1898) assumed sovereign jurisdiction over the Hawaiian Islands. By virtue of Article 17 of the Constitution of the Republic of Hawaii the appellee became at the inception of said Republic and remained during its existence a citizen of the Republic of Hawaii.

On June 14, 1900, by reason of having been on August 12, 1898, a citizen of the Republic of Hawaii, the appellee, together with all who had been on August 12, 1898, citizens of said Republic, was collectively naturalized a citizen of the United States by chap. 339, Sec. 4 of the Organic Act of April 30, 1900. (31 Stat. 141.)

II.

THE APPELLEE LOST HER UNITED STATES CITIZENSHIP BY HER MARRIAGE IN 1910 TO AN ALIEN INELIGIBLE TO CITIZENSHIP.

The Act of March 2, 1907, chap. 2534, Sec. 3, 34 Stat. 1228, provided that "Any American woman who marries a foreigner shall take the nationality of her husband * * *" This statutory provision remained in effect until September 22, 1922 (42 Stat. 1022), at which time it was specifically repealed, and the potential prospective operation of its designated methods of the reacquisition of the United States citizenship upon the termination of the marital status was also specifically cancelled. (c. 411, Secs. 3, 7, 42 Stat. 1022; see 8 U.S.C.A., Sec. 369, and *Mackenzie v. Hare* (1915), 359 U.S. 299, 36 S. Ct. 106.) Parenthetically it may be observed that even after said Act of September 22, 1922, and up until the Act of March 3, 1931 (c. 442, Sec. 4(a), 46 Stat. 1511, 8 U.S.C.A., Sec. 9), the marriage of a woman citizen to an alien ineligible to citizenship resulted in the woman's loss of United States citizenship.

The appellee's 1910 marriage, therefore, to Lum Chew Hung, an alien Chinese, caused the appellee to lose her United States citizenship, and also to become in the eyes of the United States an alien of the Chinese race.

III.

THE APPELLEE IS NOT ELIGIBLE FOR NATURALIZATION PURSUANT TO SECTION 4 OF THE ACT OF SEPTEMBER 22, 1922, AS AMENDED BY THE ACT OF JULY 2, 1932.

Being a person of the Chinese race, the appellee would not be eligible for naturalization unless Congress had made an exception. (8 U.S.C.A., Secs. 359, 363.)

Not until March 3, 1931 (c. 442, Sec. 4(a), 46 Stat. 1511), did Congress provide for the naturalization of a woman while married to a person ineligible to citizenship.

But on that date (March 3, 1931) Congress provided that a former native born woman citizen who had lost her United States citizenship by marriage to an alien ineligible to citizenship could, if she had not acquired other nationality by her affirmative acts, be naturalized in the manner prescribed by Section 369 of Title 8, U.S.C. Congress further provided in the same section of the statute (8 U.S.C.A., 369a) that a woman who was a United States citizen at birth should not be denied naturalization under Section 369 of Title 8, U.S.C., on account of her race.

Here was an apparent method by which this appellee could reacquire United States citizenship. She had lost her United States citizenship by marriage to Lum Chew Hung, an alien Chinese. She had not acquired other nationality by her affirmative acts. She was not barred because she was a person of the Chinese race. But, was she at birth (Honolulu, 1894) a citizen of the United States?

The answer to that question is definitely "NO"; the reason being set forth in detail in part I of the Argument in this brief.

That this negative answer is legally accurate is inferentially attested to by the statutory enactment of July 2, 1932. (c. 395, 47 Stat. 571, 8 U.S.C.A., 368b.)

On July 2, 1932, Congress recognized the predicament of women of the appellee's class. It observed with accuracy that not until June 14, 1900, were persons born in Hawaii United States citizens by reason of the common law principle of "jus soli" of which the 14th Amendment is declaratory. (See *U. S. v. Wong Kim Ark,* 169 U.S. 649, 18 S. Ct. 456.)

By the Act of July 2, 1932 (c. 395, 47 Stat. 571, 8 U.S.C.A., 368b), Congress provided that for the purposes of Section 369a of Title 8, United States Code, "a woman born in Hawaii prior to June 14, 1900, shall, *if residing in the United States on July 2, 1932,* be considered to have been a citizen of the United States at birth". (Italics added.)

This statute brought the appellee one step closer to a means of reacquiring United States citizenship.

Yet—the medium of naturalization pursuant to Section 369 of Title 8, U.S.C., still remained unavilable to this appellee, for the precise reason that *she was not residing in the United States on July 2, 1932.*

Why Congress so limited this class of women for the purposes of Section 369a of Title 8, U. S. C., does not concern us here. What is controlling is that Congress has spoken distinctly and precisely. It has said

that for the purposes of Section 369a of Title 8, U. S. C., a woman, born in Hawaii prior to June 14, 1900, who has lost her United States citizenship by marriage to an alien ineligible for citizenship, and who has not acquired other nationality by affirmative act, may—though not a free white person, nor of African nativity or descent (8 U.S.C.A., Sec. 359), and notwithstanding the fact that the woman is a person of the Chinese race (8 U.S.C.A., 363)—be naturalized pursuant to Section 369 of Title 8, U. S. C., *IF* she was residing in the United States on July 2, 1932.

The appellee was not residing in the United States on July 2, 1932. She first returned after her 1907 departure in October, 1934.

THEREFORE, the appellee was not eligible for naturalization pursuant to Section 4 of the Act of September 22, 1922, as amended by the Act of July 2, 1932 (8 U.S.C.A., 369, 369a, 368b), and the Court below erred in overruling the appellant's motion to dismiss the appellee's petition for naturalization thereunder, and further erred in holding the appellee to be eligible for naturalization under said statute.

> "Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant."
>
> *U. S. v. Manzi,* 276 U.S. 463, 467.

CONCLUSION.

It is submitted that the errors of law committed by the trial Court were prejudicial to the appellant's rights, and that this Court should so hold and reverse the trial Court's decision and order appellee's naturalization certificate cancelled.

Dated, Honolulu, T. H., this 6th day of November, A. D. 1936.

Respectfully submitted,

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Due service and receipt of a copy of the foregoing brief is hereby admitted this 12th day of November, A. D. 1936.

Dang Mew Wan Lum,
Appellee.

(Appendix Follows.)

Appendix.

Appendix

The Act of March 2, 1907, c. 2534, Sec. 3, 34 Stat. 1228 (see 8 U.S.C.A., Sec. 9, note 6), reads as follows:

> "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a counsel of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

The Act of September 22, 1922, c. 411, Sec. 4, 42 Stat. 1022, as amended (see 8 U.S.C.A., Sec. 369), which reads as follows:

> "A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: Provided, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United

States under section 17 of this title. Nothing herein shall be construed to repeal or amend the provisions of section 15 of this title or of section 17 with reference to expatriation. The repeal of section 3 of Act March 2, 1907, chapter 2534, Thirty-fourth Statutes, page 1228, which provided that 'any American woman who marries a foreigner shall take the nationality of her husband', and that 'at the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein,' shall not restore citizenship lost thereunder, nor terminate citizenship resumed thereunder; and any woman who had resumed thereunder citizenship lost by marriage shall, from September 22, 1922, have for all purposes the citizenship status as immediately preceding her marriage."

The Act of July 3, 1930, c. 835, Sec. 2(a), 46 Stat. 854 (see 8 U.S.C.A., Sec. 369), which reads as follows:

"(a) A woman who has lost her United States citizenship by reason of her marriage to an alien eligible to citizenship or by reason of the loss of United States citizenship by her husband may, if eligible to citizenship and if she has not acquired any other nationality by affirmative act, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

(1) No declaration of intention and no certificate of arrival shall be required, and no period

of residence within the United States or within the county where the petition is filed shall be required;

(2) The petition need not set forth that it is the intention of the petitioner to reside permanently within the United States;

(3) The petition may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner;

(4) If there is attached to the petition, at the time of filing, a certificate from a naturalization examiner stating that the petitioner has appeared before him for examination, the petition may be heard at any time after filing.

(b) After her naturalization such woman shall have the same citizenship status as if her marriage, or the loss of citizenship by her husband, as the case may be, had taken place after July 3, 1930."

The Act of March 3, 1931, c. 442, Sec. 4(a), 46 Stat. 1511 (see 8 U.S.C.A., Sec. 369a), which reads as follows:

"Any woman who before March 3, 1931, has lost her United States citizenship by residence abroad after marriage to an alien or by marriage to an alien ineligible to citizenship may, if she has not acquired any other nationality by affirmative act, be naturalized in the manner prescribed in section 369 of this title. Any woman who was a citizen of the United States at birth shall not be denied naturalization under section 369 on account of her race."

The Act of July 2, 1932, c. 395, 47 Stat. 571 (see 8 U.S.C.A., Sec. 368b), which reads as follows:

"For the purposes of section 369a of this title, a woman born in Hawaii prior to June 14, 1900, shall, if residing in the United States on July 2, 1932, be considered to have been a citizen of the United States at birth."

Article 17 of the Constitution of the Republic of Hawaii reads as follows:

"All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic, are citizens thereof."

Chapter 339, Section 4, of the Organic Act of April 30, 1900 (31 Stat. 141), reads as follows:

"That all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii.

And all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August twelfth, eighteen hundred and ninety-eight, and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii."